LE COPY

Supreme Court, U. S.
FILED
MAR 30 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 684

UNITED STATES OF AMERICA

v.

BEN R. HARRIMAN, JERRY SINER and
FRANK LOUIS DE ROSA,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS BENDER,
Attorney for Petitioners,
170 Broadway,
New York, N. Y.

JULIAN JAWITZ,
RICHARD I. DONNER,
of Counsel.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
49

BLEED THROUGH POOR COPY

INDEX

PAGE

PETITION:

The Charge in the Indictment 1

The Trial and the Government's Proof 2

The Opinion of the District Court 5

The Opinion of the Court of Appeals 5

Jurisdiction 5

Questions Presented 5

Statute Involved 6

Reasons for Granting the Writ 7

Conclusion 13

APPENDIX:

Opinion of the United States Court of Appeals for the Second Circuit 1A

Judgment 3A

Cases Cited

Ansley v. United States, 135 F. 2d 207 (5 Cir. 1943) 13

Banks v. United States, 147 F. 2d 628 (9 Cir. 1945).. 13

Best v. District of Columbia, 291 U. S. 411 10

Carnero v. United States, 48 F. 2d 69 (9 Cir. 1931).. 11

Collins v. United States, 65 F. 2d 545 (5 Cir. 1933).. 13

Epstein v. United States, 174 F. 2d 754 (6 Cir. 1949) 13

McGuire v. United States, 152 F. 2d 577 (8 Cir. 1945) 10

Nosowitz v. United States, 282 Fed. 275 (2 Cir. 1922) 13

Oscanyon v. Arms Co., 103 U. S. 261 10

PAGE

Rose v. United States, 149 F. 2d 755 (9 Cir. 1945) ... 10, 13
Rowley v. United States, 191 F. 2d 949 (8 Cir. 1951). 8

United States v. Ball, 163 U. S. 662 11
United States v. Dietrich, 126 Fed. 676 (Cir Ct. Neb. 1904) 10
United States v. Jones, 174 F. 2d 746 (7 Cir. 1949).. 13
United States v. Shelley, 218 F. 2d 157 (2 Cir. 1954) 5, 7, 7n, 8, 8n
United States v. Shoemaker, 27 Fed. Cases 16279, 2 McLean 114 (Cir. Ct. Ill. 1840) 11
United States v. Stone, 308 U. S. 519, aff'g. Ex parte United States, 101 F. 2d 870 (7 Cir. 1939) 13

Statutes Cited

United States Code:

Title 18, Section 656 1

Title 28, Section 1254(1) 5

Rules Cited

Federal Rules of Criminal Procedure:

Rule 29a 4, 5, 6, 7, 8, 9, 12, 13

Rule 37(b)(2) 5

Rule 48a 5, 6, 11

Rule 52a 3

Other Authorities Cited

Federal Rules of Criminal Procedure with notes of Advisory Committee and Proceedings of the Institute of New York University School of Law (1946) 11

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

October Term, 1954

No.

—o—

UNITED STATES OF AMERICA

v.

BEN R. HARRIMAN, JERRY SINER and FRANK LOUIS DE ROSA,

Petitioners.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Ben R. Harriman, Jerry Siner and Frank Louis De Rosa (referred to herein as the defendants), respectfully pray a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered February 28th, 1955, which dismissed the appeal of the defendants, taken from the denial by the United States District Court for Southern District of New York, of the defendants' motion for judgment of acquittal.

The Charge in the Indictment

The defendant, Frank Louis De Rosa, an employee of the Royal Industrial Bank of New York, was charged with the violation of Section 656 of Title 18 of the United States Code, alleging that he embezzled, extracted and wilfully

misapplied certain moneys, funds and credits of said bank. The indictment, C140-65, alleged that said bank was a member bank of the Federal Reserve System. The defendants Ben R. Harriman and Jerry Siner are charged with aiding, abetting, inducing and procuring the commission of the offenses set forth in the indictment (2a *).

The Trial and the Government's Proof

Indictment C140-65 was consolidated for trial with indictment C140-66, which alleges a similar offense involving moneys of the Trading Bank & Trust Company in which latter indictment the defendants were Herbert Shniper, Ben R. Harriman and Jerry Siner. The trial commenced on August 16, 1954 and continued daily through August 19, 1954.

During the first day of the trial, after the jury had been impaneled and sworn and counsel for the respective parties had made their openings, and during the taking of the testimony of the first of the Government's witnesses, the Government offered in evidence a certificate that the Royal Industrial Bank of New York was an insured bank with the Federal Deposit Insurance Corporation (12a-13a). The defendants objected to the admissibility thereof, whereupon questioning developed that the Government knew that the Royal Industrial Bank of New York was not a member bank of the Federal Reserve System, as alleged in the indictment, and that it could not prove that it was such a member bank and that it was aware of this fact on the morning of the first day of the trial (13a). The Government moved to conform the indictment to the proof which motion the

* All page references followed by letter "a" are to printed record in Court below; all page references to opinion printed in this Appendix are followed by letter "A"; page references without a letter preceding or following are to the record filed with the clerk of the Court below.

BLEED THROUGH POOR COPY

Court made no disposition of at that time (13a-14a). At a later date, during the course of the four day trial, when it was pointed out that the Court had no power to amend the indictment, since it was that of the grand jury, the Government changed its position in this respect and withdrew said motion (23a), and then contended that there was an immaterial variance between the indictment and the proof, which should be disregarded under the provisions of Rule 52 (a) of the Federal Rules of Criminal Procedure (45a).

On the fourth day of the trial, after considering the arguments on this issue, the Court made the pronouncement that it would no longer take any testimony on indictment C140-65. The Court ruled that if the indictment continued on trial in its present form, it would be forced to rule at the conclusion of the trial that the proof that the Royal Industrial Bank of New York was an insured bank, was insufficient to sustain a conviction under the indictment and that under the circumstances it would futile to proceed with the taking of evidence in view of the Government's admission that it would not have the evidence to sustain the indictment (53a-54a).

The Court, however, was ready to proceed with the trial of the indictment C140-66 and a colloquy ensued among the various counsel and the Court with respect to proceeding on said indictment (55a-63a). The counsel for the defendant Shniper moved for a mistrial on the said indictment and counsel for the defendant Harriman joined therein (56a, 65a).

The Court stated that it had before it a motion to dismiss indictment C140-65 and in view of the fact that the Government stated that it did not have proof that the Royal Industrial Bank of New York referred to in the indictment was a member bank of the Federal Reserve System, the Court saw no point in proceeding further with the trial of said indictment and granted the motion of the defendants to dismiss that indictment (67a). As the Court

finished that statement and was about to proceed with its ruling with respect to the motion for a mistrial made under indictment C140-66, counsel for the defendant Harriman moved for a judgment of acquittal under Rule 29a of the Federal Rules of Criminal Procedure with regard to indictment C140-65 (67a). The Court stated that it did not want to be interrupted and directed counsel to wait until it had completed its ruling (67a-68a).

The Court dismissed indictment C140-65, and granted a mistrial with respect to indictment C140-66. With respect to the motion made by counsel for the defendant Harriman during the course of the Court's statement, for judgment of acquittal under Rule 29a, the Court permitted counsel to resume the making of said motion previously which had been interrupted and counsel for the other defendants under this indictment joined therein (69a-70a).

Counsel for the defendant De Rosa then requested the Court to consider that the motion for judgment of acquittal was to have been made before the dismissal of the indictment so that technically the defendants would not be faced with an indictment which had been dismissed.*

---

* The record with respect thereto reads as follows:

"Mr. Selkowe: Would your Honor be good enough to consider the fact that Mr. Bender was to make that motion before your Honor had dismissed the indictment, so that we are not hereafter faced with a technical motion, because the indictment has been dismissed?

Mr. Patterson: I oppose any change in the defendants' position at this time. Your Honor ruled on the motion to dismiss, and after that—

The Court: That could all be put into the briefs, in the memoranda which are submitted to me.

Mr. Bender: That is the reason why I interrupted you.

The Court: I had already ruled on the dismissal on that particular indictment at this time, if that makes any difference. I don't know whether it does.

Mr. Selkowe: Except I had not had the opportunity to be heard, and I wished to make this motion for judgment of acquittal prior to your Honor's decision, but I had retained my seat so as not to interrupt with Mr. Bender who was then concerned with indictment 66, so that I feel—" (70a-71a).

BLEED THROUGH POOR COPY

The Opinion of the District Court

The District Court thereafter in a written opinion dated September 3, 1954, made fifteen days after the trial, denied the motion for judgment of acquittal on the grounds that under Rule 29a of the Federal Rules of Criminal Procedure, such a motion should be granted only after all of the evidence on either side had been *presented* and for the further reason that the motion for a dismissal of the indictment made by the defendant was exactly the same as if the United States Attorney had filed a dismissal of the indictment and the defendants had consented thereto under Rule 48 and by reason thereof, the dismissal of said indictment was equivalent to a dismissal under Rule 48a of the Fed. Rules Crim. Proc. (73a-78a).

The Opinion of the Court of Appeals

The Court of Appeals for the Second Circuit on February 28, 1955, in a *per curiam* opinion, dismissed the appeal (1 A). The basis of its decision was the case of *United States* v. *Shelley*, 218 F. 2d 157 (2 Cir. 1954).

Jurisdiction

The judgment of the Court of Appeals was entered on February 28, 1955. The jurisdiction of this Court to review by Writ of Certiorari the judgment complained of, is conferred by Title 28, Section 1254(1) of the United States Code and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether an appeal will lie from the denial of a motion for acquittal after the Government concedes its in-

ability to prove the allegations of an indictment, the trial court directs the case to be closed, and on defendant's motion the indictment is dismissed.

2. Whether the Government is required to present its *entire* case before the evidence will be considered closd, as a requisite to the granting of the judgment of acquittal, where the Government admits its inability to prove a necessary allegation of the indictment?

3. Whether a motion by defendants to dismiss the indictment for inability to prove the same may properly be considered as a motion made by the United States Attorney under Rule 48a of the Federal Rules of Criminal Procedure for a *nolle prosequi.*

4 (a). Whether the motion for dismissal of the indictment based upon the Government's inability to submit evidence to sustain a conviction under the indictment was, for all purposes, equivalent to a motion for judgment of acquittal under Rule 29a of the Federal Rules of Criminal Procedure?

(b). Whether the form of the motion made by the defendants is immaterial so that the defendants are entitled to the formal granting of a motion for the judgment of acquittal where the facts before the Court warrant the granting of the same.

Statute Involved

Rule 29a of the Federal Rules of Criminal Procedure provides as follows:

> "*Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one

BLEED THROUGH POOR COPY

or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

Reasons for Granting the Writ

The decision of the Court below dismissing the appeal in effect affirms the determination of the District Court which is contrary to the decisions of this Court and of Courts of Appeal in other circuits, is inconsistent with the history and purpose of Rule 29a of the Federal Rules of Criminal Procedure, and furthermore, presents important questions in the administration of the criminal law and the practice thereof in the federal courts, affecting a large number of cases.

1. The case of *United States* v. *Shelley*, 218 F. 2d 157 (2 Cir. decided December 29, 1954), upon which the Court of Appeals based its *per curiam* opinion dismissing the defendant's appeal, involved the granting of a motion to dismiss an information based upon lack of proper venue. The district court in that case did not rule or pass upon the other motion made by the defendant therein for judgment of acquittal. It did not go to the merits of the case or the admitted failure to prove an essential allegation of the indictment. In the *Shelley* case, *supra*, the defendant appealed from the order *granting* his motion to dismiss the information.*

* This is clear from the order of the District Court in the *Shelley* case which in pertinent part provides as follows:

"ORDERED that a motion to dismiss the information against the defendant on the ground that the evidence does not estab-

The District Court in the *Shelley* case, *supra,* did not rule on the motion for judgment of acquittal. Consequently there was no decision, order or judgment with respect thereto from which the defendant therein could appeal. Having appealed solely from a favorable determination on his own motion, the Court of Appeals therefore held that he was not a party aggrieved, but rather a successful litigant.

The distinction between the *Shelley* case, *supra,* and that of the instant case in this particular, is readily apparent. The motion for judgment of acquittal in the instant case was made and formally denied by the District Court in a lengthy opinion. The motion by the defendants for a judgment of acquittal came, in all respects, after the case had been closed. The Government conceded that it could not prove the indictment and the Court stated it would not take further testimony on that indictment. The Court, by precluding further testimony, closed the evidence within the requirements of Rule 29a Fed. R. Crim. Proc. The denial of said motion by the District Court was, therefore, final and appealable. *Rowley* v. *United States,* 191 F. 2d 949, 951 (8 Cir. 1951).

> lish that the defendant committed the offense charged in the information within the Eastern District of New York is granted, and Count No. Two of the Information herein is hereby dismissed" (Transcript of Record, p. 19).

and from the notice of appeal filed by said defendant which likewise provides as follows:

> "Appeal is from a judgment and final order dated July 23, 1954 entered after trial which dismissed Count 2 of the information against the defendant upon the ground that the evidence does not establish that the defendant committed the offense charged in Count No. 11 of the information within the Eastern District of New York" (Transcript of Record, p. 20).

BLEED THROUGH POOR COPY

No further proceedings remained to be taken under the indictment. Rule 29a directs the Court to enter a judgment of acquittal after the evidence is closed on either side where it is insufficient to sustain a conviction. To hold that an appeal did not lie under such circumstances leaves no remedy to defendants, as aggrieved persons, from a final order denying to them a right granted by the Federal Rules of Criminal Procedure, and establishes a precedent whereby a District Court, may dismiss the indictment where the Government admits, during the course of a trial, it could not prove the same and thus frustrate the very purpose of the rule. To permit this situation would completely unsettle long-established practice in the Federal Courts with respect to the rights of a defendant to the direction of a judgment of acquittal under these circumstances. If appeal did not lie from the denial of such a motion, after the case is closed, defendants, in federal prosecutions, may needlessly be subjected to further proceedings, costs and legal harrassments. It is important theretofore that this determination be reviewed and the legal principles applicable thereto clearly defined for the guidance of the Courts and members of the Bar.

2. By dismissing the appeal, the Court of Appeals permitted the determination of the District Court to stand uncontested to the effect that Rule 29a of the Federal Rules of Criminal Procedure

> "* * * would contemplate that a judgment of acquittal should be entered *only after all of the evidence on either side has been presented*" (76a). (Emphasis added.)

This determination was made, despite Rule 29a, which specifically provides that the Court *shall* order the entry of judgment of acquittal

> "* * * after the *evidence on either side is closed* if the evidence is insufficient to sustain a conviction of such offense or offenses." (Emphasis added.)

The question is an important one. The interpretation placed upon this rule is contrary to the literal meaning thereof and in conflict with the decisions of this Court and courts of appeal of other jurisdictions. *Best* v. *District of Columbia*, 291 U. S. 411, 415; *Oscanyon* v. *Arms Co.*, 103 U. S. 261, 263; *McGuire* v. *United States*, 152 F. 2d 577 (8th Cir. 1945); *Rose* v. *United States*, 149 F. 2d 755 (9th Cir. 1945); *United States* v. *Dietrich*, 126 Fed. 676 (Cir. Ct., Neb. 1904).

In the foregoing cases, the courts terminated prosecutions upon the opening statements of prosecutors, where a fact was clearly and unequivocally admitted which would necessarily prevent a conviction and require an acquittal, the courts thus holding they have the same power to act upon an admission of the prosecutor as upon the evidence.

The District Court herein has now held directly contrary to what has heretofore been accepted as established criminal procedure, that it is powerless to direct judgment of acquittal even though it has directed that the Government desist from presenting further evidence because of the Government's admission it could not prove the indictment. The Court of Appeals, based upon a prior decision of its own which is not at all analogous to the instant case has dismissed the appeal, and defendants before the federal criminal courts are faced with a new precedent contrary to prior established law, prior determinations in other circuits and prior decisions of this Court. The practice of federal criminal law will become unsettled on this important and very practical problem with respect to motion for judgment of acquittal unless this case be reviewed and the legal principles applicable thereto be clearly stated.

3. The Court of Appeals, in dismissing the appeal herein, in effect approved the determination of the District Court that the motion made by the defendants to dismiss the indictment by reason of the inability of the Government to prove an essential allegation thereof.

BLEED THROUGH POOR COPY

> " * * * was exactly the same as if the United States Attorney had filed a dismissal of the indictment and the defendants had consented to such dismissal of the indictment, under the provisions of Rule 48a * * *" (77a).

The District Court held the motion to dismiss the indictment made by the defendants during the course of trial after a jury had been impaneled, sworn and testimony taken, was in effect a motion for a *nolle prosequi* made by the United States Attorney under Rule 48a. Said Rule 48a provides that the United States Attorney may, by leave of Court, file a dismissal of an indictment and the prosecution shall thereupon terminate. Such a dismissal may not, however, be filed during the trial without the consent of the defendant. The rule is a restatement of the existing law, Federal Rules of Criminal Procedure with notes of Advisory Committee and Proceedings of the Institute of New York University School of Law (1946). This is contrary to the settled determinations of this Court and of various courts of appeal, and contrary to the history of the rule as set forth in the notes of the Advisory Committee which drafted the new Rules of Criminal Procedure for the United States District Courts, effective March 21, 1946. *United States* v. *Ball,* 163 U. S. 662; *Carnero* v. *United States,* 48 F. 2d 69 (9 Cir. 1931); *United States* v. *Shoemaker,* 27 Fed. Cases 16279, 2 McLean 114 (Cir. Ct. Ill. 1840).

The instant case is directly analogous to the *Shoemaker* case, *supra.* The United States Attorney herein knew before going to trial that the Government was not prepared to meet the issues. Nevertheless, the Government pressed for trial, opposing defendants' application for adjournment. The Government should not thereafter be permitted to abandon the prosecution with the view of commencing *de novo* after the trial has commenced, when it is confronted by its inability to prove the indictment. In the instant case, the complaint under which the defend-

ants were arrested, described the Royal Industrial Bank of New York as an *insured* bank of the Federal Deposit Insurance Corporation. The indictment charged that the bank was a *member* bank of the Federal Reserve System. The prosecutor only several days before the trial requested counsel for the defendants to stipulate that the bank involved was either a member bank or an insured bank (313), and on the first day of the trial stated that he had that morning noticed that the Royal Industrial Bank was not a member of the Federal Reserve System, but a bank insured by the Federal Deposit Insurance Corporation (13a). If the theory of the District Court is permitted to stand uncorrected it would open the path for prosecutors to commence trials and where they find that they have insufficient evidence to sustain the allegations, to terminate the same with the cooperation of the District Court judge, in derogation of the Federal Rules of Criminal Procedure and the constitutional rights of defendants. The Court of Appeals has permitted this decision to stand. It is submitted that certiorari should be granted so that this important principle of criminal procedure and interpretation of Rule 48a be settled.

4. The labelling of the motion made by the defendants upon the Government's admission that it could not prove an essential allegation of the indictment, as a motion to dismiss the indictment, may have been somewhat inartistic. The literal wording of Rule 29a, however, makes it mandatory upon the trial judge, whether on his own motion or that of the defendant, to direct the entry of judgment of acquittal after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction as a matter of law. The District Court judge determined as a matter of law that the evidence was insufficient in the instant case, that it would serve no useful purpose to continue the trial and thereupon closed the Government's case by stating that it would hear no further evidence. The rule therefore was mandatory upon the Court, after it had made such

BLEED THROUGH POOR COPY

finding, that the Court direct the entry of judgment of acquittal. Its failure so to do and the dismissal of the appeal by the Court of Appeals are therefore contrary to the rule and the history thereof and require the determination of this point by this Court. This Court and the courts of appeal for the various circuits, including the Second Circuit, have heretofore held that where a motion is made during trial based on the insufficiency of the evidence the same must be granted, without regard to how the motion was labelled. The courts have treated a motion to "dismiss" or to "discharge" under such circumstances, as motions for acquittal. *United States* v. *Stone*, 308 U. S. 519 aff'g *Ex parte United States*, 101 F. 2d 870 (7 Cir. 1939); *Nosowitz* v. *United States*, 282 Fed. 575 (2 Cir. 1922); *Epstein* v. *United States*, 174 F. 2d 754 (6 Cir. 1949); *Banks* v. *United States*, 147 F. 2d 628 (9 Cir. 1945); *Ansley* v. *United States*, 135 F. 2d 207 (5 Cir. 1943); *United States* v. *Jones*, 174 F. 2d 746 (7 Cir. 1949); *Rose* v. *United States*, 149 F. 2d 755 (9 Cir. 1945); *Collins* v. *United States*, 65 F. 2d 545 (5 Cir. 1933).

In the case at bar, to permit the present ruling to stand would mean that the inartistic phrasing of a motion at close of the Government's case, as one to "dismiss" as distinguished from "acquittal", although based on the Government's failure to prove the indictment, would bar granting a defendant the relief to which he is entitled under Rule 29a, Federal Rules of Criminal Procedure, and long established interpretations thereof. This precedent, it is submitted, is contrary to law and requires granting of certiorari so that proper principles may be reestablished.

CONCLUSION

For the reasons stated, it is respectfully prayed that this petition for a writ of certiorari be granted.

Louis Bender,
Attorney for Petitioners.

BLEED THROUGH POOR COPY

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 188, October Term, 1954.

Argued February 11, 1955 Decided February 28, 1955

Docket No. 23338

—o—

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BEN R. HARRIMAN, JERRY SINER and FRANK LOUIS DEROSA,

Defendants-Appellants.

—o—

Before CLARK, Chief Judge, HINCKS, Circuit Judge, and SMITH, District Judge.

Appeal from the United States District Court for the Southern District of New York, Archie O. Dawson, Judge.

On indictment for embezzling funds from a member bank of the Federal Reserve System, defendants obtained, on their own motion, a dismissal of the indictment for material variance of the proof, which showed only insurance by the Federal Deposit Insurance Corporation; they now appeal from a subsequent denial of their motion for judgment of acquittal.

Opinion of the United States Court of Appeals for the Second Circuit

CLEMENT J. HALLINAN, JR., Asst. U. S. Atty., New York City (J. Edward Lumbard, U. S. Atty., New York City, on the brief), for plaintiff-appellee.

LOUIS BENDER, New York City (Daniel J. Riesner, Julian Jawitz, and Richard I. Donner, New York City, for defendant-appellant Ben R. Harriman; Martin Klein, New York City, for defendant-appellant Jerry Siner; and Bernard R. Selkowe, New York City, for Defendant-appellant Frank Louis DeRosa), for defendants-appellants.

PER CURIAM.

Appeal dismissed. *United States* v. *Shelley,* 2 Cir., Dec. 29, 1954.

BLEED THROUGH POOR COPY

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of February, one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. CARROLL C. HINCKS,
Circuit Judge,

HON. J. JOSEPH SMITH,
District Judge.

———o———

U. S. A.,

Plaintiff-Appellee,

v.

BEN R. HARRIMAN, JERRY SINER and FRANK LOUIS DE ROSA,

Defendants-Appellants.

———o———

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed, that the appeal from the judgment of said District Court be and it hereby is dismissed. *United States* v. *Shelley,* 2 Cir. Dec. 29, 1954.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. Daniel Fusaro,
Clerk.

BLEED THROUGH POOR COPY

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and rules involved	2
Statement	4
Argument	7
Conclusion	9

CITATIONS

Cases:	
Burton v. *United States*, 202 U. S. 344	8
Lewis v. *United States*, 216 U. S. 611	7
Salta v. *United States*, 44 F. 2d 752	8
United States v. *Shelley*, 218 F. 2d 157	6, 7
Statutes and Rules:	
18 U. S. C. 656	2
Rule 29 (a), F. R. Crim. P	3
Rule 48 (a), F. R. Crim. P	4

341197—55

BLEED THROUGH POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 684

BEN R. HARRIMAN, JERRY SINER AND FRANK LOUIS DE ROSA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1A) is not yet reported. The unreported opinion of the district court appears at pages 73–78 of the record.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1955 (Pet, App. 3A). The petition for a writ of certiorari was filed on March 30, 1955. The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Petitioners were indicted for embezzlement from a member bank of the Federal Reserve System under the statute punishing embezzlement either from such banks or from banks insured by the Federal Deposit Insurance Corporation (18 U. S. C. 656). Following announcement by the government at the start of the trial that it was prepared to prove that the bank was insured by the F. D. I. C. but that it was not a member of the Federal Reserve System, the indictment, on motion of petitioners was dismissed. The question is whether the denial of petitioners' subsequent motion for acquittal was appealable.

STATUTE AND RULES INVOLVED

18 U. S. C. 656:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent,

BLEED THROUGH POOR COPY

officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Rule 29 (a), F. R. Crim. P.:

Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may

offer evidence without having reserved the right.

Rule 48 (a) F. R. Crim. P.:

> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

STATEMENT

Petitioners were indicted in the United States District Court for the Southern District of New York on a twenty-five count indictment, No. 140–65 (R. 2–8), which charged embezzlement and conspiracy to embezzle from "a member bank of the Federal Reserve System", the Royal Industrial Bank of New York. A second indictment, No. 140–66, with which the first was consolidated for trial, alleged similar offenses, involving monies taken from the Trade Bank and Trust Company by petitioners Harriman and Siner and one Herbert Shniper (Pet. 2, R. 1).

During the testimony of the first government witness, the government offered in evidence a certificate that the Royal Industrial Bank was insured with the Federal Deposit Insurance Corporation (R. 12). The defendants objected to the admission of this certificate on the ground that indictment 140–65 alleged that the bank was a member of the Federal Reserve System rather

BLEED THROUGH POOR COPY

than a bank insured by the Federal Deposit Insurance Corporation (R. 13, 17). The government filed a motion to conform the indictment to the proof, which was later withdrawn (R. 22–24). Petitioners then moved "to dismiss indictment C–140–65, on the ground that it appears without question from the admission made by the Government that an essential allegation in that indictment, namely, that the employee is employed by a member bank of the Federal Reserve System, cannot be proved" (R. 24). The court heard argument on that motion which dealt largely with the question of whether the variance would be fatal (R. 29–51). The next day the court stated that it would be futile to proceed with the taking of evidence since the government could not prove the charge of "that particular indictment, which is not to say that the Government might not have the evidence if there were a re-indictment." (R. 54.) When petitioners' counsel asked whether the court was ruling on the motion to dismiss Indictment No. 140–65, the court stated, "I don't believe that at the present status of this case I have any authority to grant such a motion because the case is not at a conclusion" (R. 54). He indicated readiness to proceed on case No. 140–66, but counsel for a defendant in that case moved for a mistrial on the ground that evidence already received was not relevant as to him (R. 55–56).

After argument the court indicated that he was ready to grant a mistrial in case No. 140–66 (R. 56–67), and then granted the motion to dismiss Indictment No. 140–65 (R. 67). Thereafter counsel for Harriman moved for a judgment of acquittal under Rule 29 in No. 140–65 (R. 67), but the court stated it did not want to be interrupted at that point (R. 68). It granted a mistrial in No. 140–66 (R. 69). Counsel then renewed the motion for judgment of acquittal, as to which the court reserved decision, pointing out, however, that it had already ruled on the dismissal of the indictment before any motion for acquittal was made (R. 70–71). Subsequently the court denied the motion for acquittal (R. 73–78) holding that, by making a motion to dismiss the indictment, petitioners had consented to a dismissal of the indictment during trial, and that the situation was the same as if the United State had moved for dismissal of the indictment during trial under Rule 48 (a) and petitioners had consented thereto (R. 77). An appeal to the court of appeals was dismissed on the authority of *United States* v. *Shelley,* 218 F. 2d 157 (C. A. 2) (Pet. 1A–2A), in which that court had held that one who had successfully moved to have an indictment dismissed for lack of proof as to venue had no appealable interest.

BLEED THROUGH POOR COPY

ARGUMENT

The record is clear that petitioners made no motion for a judgment of acquittal until after the court had granted their motion to dismiss the indictment. This particular case against them was therefore ended before they made the motion for judgment of acquittal. The issue is not, as petitioners seem to think, whether the denial of their motion was appealable as a final order (Pet. 7–8). The point is that, even though the order was final, petitioners, having secured the relief which they sought, had nothing about which to complain and therefore no appealable interest. Hence their appeal was properly dismissed. See *Lewis* v. *United States,* 216 U. S. 611; *United States* v. *Shelley,* 218 F. 2d 157 (C. A. 2).

Petitoners argue (Pet. 12–13) that, since their motion to dismiss was based on the evidence adduced, the court should have treated it as a motion for acquittal under Rule 29 (a), regardless of what they termed it. The record is clear, however, that none of the parties considered petitioners' motion as one for judgment of acquittal, and we cannot tell how the judge would have ruled had he thought he was ruling on a motion for acquittal. As the court pointed out in its opinion on the later motion for acquittal (R. 77), the situation it had before it when it ruled on the motion

to dismiss was more like a motion under Rule 48 (a) which can be granted after trial has begun only with the consent of the defendant. While the government had not actually moved to dismiss, petitioners, by moving to dismiss, had given the consent which is the essential requirement under Rule 48 (a). A judgment of dismissal therefore did not violate any rights of the petitioners.

It is evident that the sole purpose of petitioners' insistence on a judgment of acquittal rather than dismissal is to enable them to raise a defense of double jeopardy to any new indictment describing the bank as one insured by the F. D. I. C. While that question is not here, it would seem that, even if the judgment were designated as one of acquittal, petitioners would not be in a position to assert that the new indictment charged the same offense as the first, when they themselves had won dismissal on the ground that the difference in the allegations was material. See *Salta* v. *United States,* 44 F. 2d 752 (C. A. 1). Cf. *Burton* v. *United States,* 202 U. S. 344, 378, where this Court ruled that a senator's acquittal on a charge of having received forbidden compensation from a specified person who was an officer of a corporation was no bar to prosecution on an indictment charging receipt of the compensation from the corporation. There is thus no reason for this Court to resolve the immaterial issue of appealability raised by petitioners.

BLEED THROUGH POOR COPY

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

APRIL 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955